

This Opinion is not a
Precedent of the TTAB

Mailed: September 20, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Mannington Mills, Inc.
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Serial No. 88645881
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Sherry H. Flax of Saul Ewing Arnstein & Lehr LLP,
for Mannington Mills, Inc.

Justine N. Burke, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

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Before Shaw, Kuczma and Lynch,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Mannington Mills, Inc. (“Applicant”) seeks registration on the Principal Register
of the mark AQUABARRIER (in standard characters) for

Underlay for laminate flooring; Flooring underlayments;
Non-metal building materials, namely, laminate floor
boards, all for residential use, in International Class 19.¹

¹ Application Serial No. 88645881 was filed on October 8, 2019, based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as December 31, 2006 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with respect to its goods in International Class 19, as amended, citing Registration No. 2958974, owned by IKO Industries Ltd. ("Registrant"), for the mark AQUABARRIER for:

thin membrane for attachment to walls for waterproofing purposes, in International Class 17,

as a bar to registration.²

When the refusal was made final, Applicant appealed and twice requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeal resumed. Applicant and the Examining Attorney have submitted briefs, including Applicant's reply brief. For the reasons set forth below, we affirm the refusal to register.

I. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system and are to the downloadable .pdf version of the documents.

References to the briefs on appeal refer to the Board's TTABVUE docket system, specifically, the docket entry number and electronic page number(s) where applicable.

² Registrant's Registration No. 2958974 issued on June 7, 2005, (based on priority claimed under 15 U.S.C. § 44(d) on Canada Application No. 1129165, filed January 25, 2002, issued as Registration No. TMA607641 on April 14, 2004); and is renewed.

Registrant's mark depicted in Registration 2958974 is a typed drawing. In applications filed before November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed drawing is the legal equivalent of a standard character drawing. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 807.03(i) (July 2021).

enunciated in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Additionally, Applicant argues that the marks are not likely to be confused due to the weakness of the term “aquabarrier;” the differences in the channels of trade, the cost of the goods and the sophistication of the consumers of the goods; and that Applicant’s and the Registrant’s goods have coexisted in interstate commerce for nearly fourteen (14) years without evidence of actual confusion in the marketplace.

We have considered each *DuPont* factor for which there is evidence and argument of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (not all of the *DuPont* factors are relevant to every case, only factors of significance to the particular mark need be considered); *Citigroup Inc.*

v. Capital City Bank Grp. Inc., 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (“[T]he factors have differing weights.”); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

A. Similarity of the Marks

Applicant admits that its mark AQUABARRIER is identical to the cited mark. The identity of words, connotation, and commercial impression weighs heavily against Applicant. *In re Shell Oil*, 26 USPQ2d at 1688; *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1289-90 (Fed. Cir. 1984). Even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source. *In re Shell Oil*, 26 USPQ2d at 1689. Thus, the first *DuPont* factor, the similarity of the marks, weighs in favor of finding a likelihood of confusion.

B. Similarity of the Goods, Channels of Trade and Classes of Customers

We turn to the next *DuPont* factors involving the similarity or dissimilarity and nature of the goods, and the channels of trade and classes of customers. Where identical marks are involved, as we have here, this leads to the assumption that there is a common source even when goods or services are not competitive. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017) (citing *In re Shell Oil*, 26 USPQ2d at 1689). Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by

the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1814-15 (TTAB 2001); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ2d 910, 911 (TTAB 1978).

Notwithstanding Applicant's argument regarding the differences in the actual scope of its own and Registrant's uses of their marks,³ the nature, scope and similarity of the goods must be determined based on the identification of goods listed in the application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic*, 123 USPQ2d at 1749); *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods.").

Applicant's goods are identified as:

[U]nderlay for laminate flooring; flooring underlayments; and non-metal building materials, namely, laminate floor boards, all for residential use.

The Examining Attorney argues that the limitation claiming "all for residential use" in Applicant's identification of goods applies only to "non-metal building materials, namely, laminate floor boards." The remainder of Applicant's goods, according to the

³ Applicant's Brief p. 6 (6 TTABVUE 10).

Examining Attorney, “remain without limitation and could encompass those for both residential and non-residential uses.”⁴

In support, the Examining Attorney notes that semicolons are used to separate distinct categories of goods or services within a single class, citing *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (finding that, because a semicolon separated the two relevant clauses in registrant’s identification, its “restaurant and bar services” is a discrete category of services that stands alone and independently as a basis for likelihood-of-confusion analysis, and is not connected to nor dependent on the services set out on the other side of the semicolon).

First, it does not matter whether all of Applicant’s goods are restricted to residential use. Registrant’s goods are not restricted and therefore, presumptively include goods for residential use. Second, the Examining Attorney’s citation to *Midwest Gaming & Entm’t*, which supports use of semicolons to separate distinct categories of goods or services within a single class, does not directly address the issue involved with Applicant’s inclusion of “, all for residential use” at the end of its identification of services. The TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.01(a) (July 2021) states general rules for the use of commas and semicolons: “commas should be used in the identification to separate items within a particular category of goods or services” and “[s]emicolons should generally be used to separate distinct categories of goods or services within a single class.” Neither

⁴ Examining Attorney Brief at 10 TTABVUE 7.

addresses the inclusion of a qualifying term that is applicable to all of the foregoing goods listed in an identification.

Although Applicant did not address this matter in its opening or reply briefs, it previously advised the Examining Attorney that it amended the identification of goods to limit their use to “residential,” which “distinguishes the nature of the product, channel of trade, and relevant consumer from Registrant’s waterproof wall membrane for commercial use.”⁵

The limiting language “, all for residential use” applies to all of Applicant’s goods. If Applicant intended for the residential use restriction to apply only to the immediately preceding goods, i.e., laminate floor boards, it likely would have amended those goods to “non-metal building materials, namely, laminate floor boards for residential use,” omitting the word “all.” The inclusion of the word “all” before “residential use,” in the terminal separate phrase “, all for residential use,” supports Applicant’s position that “all” of its goods are for residential use.

To support the relatedness of Applicant’s and Registrant’s goods the Examining Attorney submits the following evidence from third-party websites:⁶

- Custom Building Products⁷ offering (1) waterproofing membranes and (2) flooring underlayments under CUSTOM®

<https://www.custombuildingproducts.com/products/surface-preparation/waterproofing-membranes-underlayments.aspx>

⁵ See September 1, 2020 (second) Request for Reconsideration at TSDR 1, 3.

⁶ Examining Attorney Brief at 10 TTABVUE 8-9.

⁷ November 6, 2019 Office Action, TSDR 9-13.

- Polyguard Products, Inc.⁸ offering (1) flooring underlayments and (2) waterproofing membranes under POLYGUARD®

<https://polyguardproducts.com/architectural/waterproofing-systems/special-use-membrane-waterproofing/tileguard-anti-fracture-underlayment/>

- DMX Membranes Limited⁹ offering (1) underlay for laminate flooring and flooring underlayments and (2) waterproofing membranes under DMX brandname

<http://www.dmxmembranes.com/flooring-membrane/>

- Proflex Products Inc.¹⁰ offering (1) underlay for laminate flooring and flooring underlayments and (2) waterproofing membranes under PROFLEX®

<http://www.proflex.us/wordpress/products/waterproofing-membranes/hydra-mat/>

- Schluter Systems¹¹ offering (1) flooring underlayments and (2) waterproofing membranes under SCHLUTER®

[https://www.schluter.com/schluter-us/en_US/Membranes/Waterproofing-\(KERDI\)/Schluter%C2%AE-KERDI/p/KERDI](https://www.schluter.com/schluter-us/en_US/Membranes/Waterproofing-(KERDI)/Schluter%C2%AE-KERDI/p/KERDI)

- Spycor Building Products¹² offering (1) underlay for laminate flooring and flooring underlayments and (2) waterproofing membranes under PLATON®

<https://www.spycorbuiilding.com/CertainTeed-Platon-Waterproofing-Membrane-Subfloor-p/xsm.htm>

⁸ *Id.*, TSDR 14-17.

⁹ *Id.*, TSDR 18-24.

¹⁰ *Id.*, TSDR 25-30.

¹¹ January 28, 2020 Office Action, TSDR 7-13.

¹² *Id.*, TSDR 14-22.

- W.R. Meadows¹³ offering (1) flooring underlayments and (2) waterproofing membranes under W.R. MEADOWS®

<https://www.wrmeadows.com/mel-rol-waterproofing-membrane/>

- Henry Company¹⁴ offering (1) underlay for laminate flooring and flooring underlayments and (2) waterproofing membranes under HENRY®

<https://henry.com/commercial/self-adhered-water-resistive-air-barriers/blueskin-sa> and <https://henry.com/commercial/roof-underlayments/eaveguard-self-adhered-shingle-underlayment>

This evidence shows that flooring underlayments and waterproofing membranes for attachment to walls are commonly provided by a single source under the same mark and/or brand name for commercial and residential projects. Therefore, customers familiar with Registrant's goods may well expect that Applicant's goods offered under an identical mark are related and would be provided by Registrant or vice versa. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015) (relatedness found where Internet evidence from six websites demonstrated goods commonly emanated from the same source under a single mark); *see also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

Citing *In re St. Helena Hospital*, 774 F.3d 747, [113 USPQ2d 1082] (Fed. Cir. 2014), Applicant argues that “[t]here is no per se rule that goods used in building or construction are so highly related as to support a refusal to register.” The Examining

¹³ *Id.*, TSDR 27-38.

¹⁴ *Id.*, TSDR 39-44.

Attorney's reliance on the sale of Applicant's and Registrant's goods from a single source as the basis for this conclusion is not enough, according to Applicant, when "consumers, especially sophisticated consumers, have come to understand that 'super-retailers' sell a large variety of products that do not emanate from the same source" "something more is required to establish relatedness, and the Examining Attorney has not provided that information."¹⁵

Unlike the situation in *In re St. Helena Hospital*,¹⁶ the evidence submitted by the Examining Attorney here shows third-party use of identical marks by the same source for the same goods as Applicant's and Registrant's goods. Thus, it demonstrates that the involved goods may emanate from a common source under the same mark and customers will encounter these goods in the same trade channels. *See e.g., In re Detroit Athletic*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because "[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both"); *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878 at *6 (TTAB 2020) ("This evidence shows that consumers may expect to find both Applicant's and Registrant's goods as identified in the involved application and cited registration as emanating from a common source. This evidence is not from 'big box'

¹⁵ Applicant's Appeal Brief p. 6 (6 TTABVUE 10).

¹⁶ To the extent Applicant seeks to extend the "something more" requirement from *In re St. Helena Hospital* to this case, the reliance on that case is misplaced. "Something more" is only required in the context of comparing goods versus services, not goods versus goods, and only where the relationship between the goods and services is obscure or less evident. *See* 113 USPQ2d at 1087.

retail stores or online retailers selling a wide variety of goods, but rather from specialty retailers.”); *In re Iolo Tech., LLC*, 95 USPQ2d 1498, 1500-01 (TTAB 2010) (“The examining attorney also submitted evidence from several websites to show that various types of optimization software such as identified by applicant and technical support services such as identified by the cited registration are advertised to consumers under the same mark.”); *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009) (holding the goods, while different and not interchangeable, are related because the evidence, including Internet excerpts showing third parties using the same marks for both sets of products, clearly demonstrates that there are entities that are the source of both sets of products). Inasmuch as there is no evidence connecting Applicant’s argument regarding “super-retailers,” who sell a large variety of products which do not emanate from the same source, to the third-party retailer evidence in the record or the goods involved in this case, Applicant’s argument has no merit. The evidence submitted by the Examining Attorney shows goods similar to Applicant’s and Opposer’s goods offered by the same source under identical marks.

In cases such as this, where Applicant’s mark is identical to the cited registered mark, the degree of relatedness between the respective goods that is necessary to support a finding that the goods are related under the second *DuPont* likelihood of confusion factor is less than it would be if the marks were not identical; there need be only a viable relationship between the respective goods. *See In re Shell Oil*, 26 USPQ2d at 1688-89 (“[E]ven when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there

is a common source”); *In re Iolo*, 95 USPQ2d at 1499; *In re Davey Prods.*, 92 USPQ2d at 1202; *In re Opus One*, 60 USPQ2d at 1815.

The confusion which the Trademark Act is concerned with is not only that a purchaser would mistakenly choose Applicant’s or Registrant’s goods but also whether such a purchaser, familiar with Registrant’s goods, would believe that Applicant’s goods emanated from Registrant (or vice versa), or that the goods provided by each were somehow associated with the same source. *In re Uncle Sam Chem. Co.*, 229 USPQ 233, 235 (TTAB 1986). Thus, the issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source thereof. *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

The evidence of third-party websites offering residential laminate flooring and flooring underlayments, and waterproofing membranes for attachment to walls, under the same marks and brand names, not only supports that such goods are related but also supports that Applicant’s and Registrant’s goods are offered or provided through the same trade channels to some of the same customers supporting a finding under the third *DuPont* factor that a likelihood of confusions exists. *See, e.g., In re Davey Prods.*, 92 USPQ2d at 1203-04; *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Contrary to Applicant’s argument, Registrant’s identification of goods does not contain any limitation as to channels of trade and is not limited to commercial

construction projects.¹⁷ Because Registrant's goods are not restricted as to channels of trade they may be offered for use in both residential and commercial settings. Therefore, Applicant's identified goods travel in some of the same channels of trade as Registrant's goods. Additionally, despite Applicant's argument that its flooring goods, purchased by flooring professionals and installers, are relatively expensive and are not sold to retail customers,¹⁸ Applicant's identification of goods is not limited to those sold only to flooring professionals and installers and there is no evidence of the cost of its goods and Registrant's goods. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods").

Applicant contends that there is no overlap of "consumers" between its goods and Registrant's goods but offers no evidence in support of its contention. "Attorney argument is no substitute for evidence." *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005). The evidence of record submitted by the Examining Attorney establishes that it is common for the same source to provide Applicant's goods under the same mark as Registrant's goods, through the same retail websites, and that the respective goods are offered in the same trade channels to the same customers. Simply put, customers familiar with Registrant's mark AQUABARRIER,

¹⁷ See Applicant's Appeal Brief pp. 4-5 (6 TTABVUE 8-9) and September 1, 2020 Request for Reconsideration at TSDR 3.

¹⁸ Applicant's Brief p. 5 (6 TTABVUE 9).

upon encountering Applicant's goods offered under the identical mark, are likely to believe that Applicant's goods are in some way associated with Registrant.

In view of the similarity of the goods, channels of trade and classes of customers, these *DuPont* factors weigh in favor of finding a likelihood of confusion.

C. Sophistication

Applicant contends that the parties offer highly technical products to sophisticated consumers who exercise care and deliberation when purchasing these goods. Accordingly, Applicant asserts that these knowledgeable consumers are not likely to be confused as to the source of the goods, particularly given the differences in their essential nature and function.¹⁹

Applicant argues that the knowledgeable "consumers" of Applicant's and Registrant's goods are not likely to be confused as to the source of the goods, particularly given the differences in their essential nature and function. According to Applicant, the "professional building products suppliers" identified in the Examining Attorney's evidence sell professional building products to knowledgeable consumers:

These consumers are accustomed to making purchases of products from different sources from a single seller and are unlikely to be confused as to source of those products. Registrant's goods are highly specialized and not used by consumers without specific knowledge of the product. Thus, it is unlikely that confusion among the relevant consumers would occur.²⁰

¹⁹ Applicant's Appeal Brief p. 4 (6 TTABVUE 8).

²⁰ Applicant's Brief p. 5 (6 TTABVUE 9).

Contrary to Applicant's argument, as shown by the Examining Attorney's evidence, customers can purchase the types of goods of Applicant and Registrant under identical marks from the same source which greatly increases the likelihood of confusion. Thus, customers encountering Applicant's residential flooring goods and Registrant's waterproofing membranes in connection with identical marks are likely to believe the goods emanate from the same source.

Additionally, even if we assume purchasers of Applicant's and Registrant's goods are sophisticated, this does not necessarily mean that they are immune to source confusion. The identity of the marks and the relatedness of the goods "outweigh any presumed sophisticated purchasing decision." *In re i.am.symbolic, llc*, 116 USPQ2d at 1413 (citing *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990)); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014).

The high likelihood of customer confusion in this case outweighs any purported customer sophistication because even sophisticated customers are not immune to source confusion, especially in the case of identical marks on related goods, as we have here. *In re Davey Prods.*, 92 USPQ2d at 1204 ("[E]ven if we were to find that the goods are somewhat expensive and that some care would be taken in purchasing the goods, it is well-settled that even careful purchasers who are knowledgeable as to the goods are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of confusingly similar [and in this case,

identical] marks on or in connection with the goods”); *see also In re Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001) (“[T]he sophistication and care of purchasers under the fourth *du Pont* factor is not controlling in this case, and that it does not render these purchasers immune to source confusion arising from use of these highly similar marks on these related goods”); *In re Total Quality Grp. Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999) (“[E]ven careful purchasers are not immune from source confusion”); *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988) (being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks).

Here, the respective goods are related and sold under identical marks such that even sophisticated purchasers could be led to the mistaken belief that they originated from the same source.

D. Weak Mark Entitled to a Narrow Scope of Protection

Applicant contends its mark is a weak mark for its goods because, unlike Registrant’s mark,²¹ it was refused registration under § 2(e)(1) for mere descriptiveness resulting in Applicant claiming acquired distinctiveness under § 2(f), 15 U.S.C. § 1052(f). Admitting that Registrant’s Registration “evidences that the mark is not merely descriptive as used with Registrant’s goods,” Applicant argues that if the mark is merely descriptive of its flooring products but not merely

²¹ Registrant’s mark was also initially refused registration under § 2(e) on the ground of mere descriptiveness, which was subsequently withdrawn in view of Registrant’s “persuasive” arguments. *See* July 3, 2003 Notice of Suspension issued in connection with application Serial No. 76430605.

descriptive of Registrant's waterproof wall membrane, "it is indisputable that the goods cannot be closely related." Based on the refusal of registration on the ground that its mark was merely descriptive, Applicant concludes that Registrant's identical mark is a weak mark entitled to a narrow scope of protection.²²

The strength or weakness of Registrant's mark is probative of the likelihood of confusion. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). "The weaker [a registrant's] mark, the closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection." *Juice Generation*, 115 USPQ2d at 1674. Applicant submits no evidence of third-party uses or trademark registrations²³ of AQUABARRIER for goods related to the goods identified in Registrant's Registration. Thus, Applicant has provided no support for its argument that Registrant's mark is weak, relying only on the refusal of registration of Applicant's own mark under § 2(e)(1).

²² Applicant's Appeal Brief p. 2-3 (6 TTABVUE 6-7).

It is noted that Applicant made its § 2(f) claim in the alternative (*see* Applicant's July 24, 2020 Request for Reconsideration). However, on appeal, it did not argue in favor of its position that its mark is not descriptive. While the Board has the discretion to consider any arguments Applicant made during prosecution with regard to the descriptiveness refusal, *see In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1952 (TTAB 2018), under the circumstances of this case our ruling finding a likelihood of confusion with the cited mark renders the descriptiveness refusal moot.

²³ Prior decisions and actions of other examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. Each case, instead, must be determined on its own merits. *See In re Midwest Gaming*, 106 USPQ2d at 1165 n.3 (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). Therefore, the existence on the register of other seemingly similar marks, such as Registrant's identical mark, does not provide a basis for registrability of Applicant's mark. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Total Quality*, 51 USPQ2d at 1477.

However, the cited registered mark issued on the Principal Register without a showing of acquired distinctiveness under 2(f) of the Trademark Act. A “mark that is registered on the Principal Register is entitled to all Section 7(b) [15 U.S.C. § 1057(b)] presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.” *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). There is no evidence in the record that AQUABARRIER “is used in everyday parlance or is used by other providers in conjunction with similar goods or services to impart the same kind of information,” *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1346 (TTAB 2017), and no evidence of any third-party use or registration of AQUABARRIER that might suggest that it is conceptually weak because it has “a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that [it] is relatively weak.” *Juice Generation v. GS Enters.*, 115 USPQ2d at 1675.

Applicant has presented no evidence that AQUABARRIER is commonly used in the relevant field or is otherwise weak and entitled to only a limited scope of protection. However, even if Registrant’s AQUABARRIER mark were deemed weak, “likelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong’ mark.” *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010); *In re Colonial Stores, Inc.*,

216 USPQ 793, 795 (TTAB 1982). Where, as here, the marks are identical, there are not even any minor differences that consumers could rely on to distinguish the marks.

Inasmuch as Applicant has not shown that the term AQUABARRIER in Registrant's mark is a weak mark that is not entitled to a normal scope of protection, this *DuPont* factor is neutral.

E. Actual Confusion

Lastly, we turn to the *DuPont* factor dealing with the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion. Applicant argues that because "the marks have coexisted in the marketplace for more than 14 years without any evidence whatsoever of consumer confusion,"²⁴ Applicant's mark should be allowed to register.

However, the record is devoid of evidence relating to the extent of use of Applicant's and Registrant's marks. Thus, there is no basis for determining whether there have been meaningful opportunities for confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf*, 55 USPQ2d at 1847; *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

"A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not necessarily true, however. The lack of evidence of actual confusion carries little weight." *Gen. Mills, Inc. v. Fage Dairy Processing Indus.*, 100 USPQ2d 1584, 1603 (TTAB 2011), judgment

²⁴ Applicant's Appeal Brief p. 6 (6 TTABVUE 10).

set aside on other grounds, *General Mills, Inc. v. Fage Luxembourg S.A.R.L.*, 110 USPQ2d 1679 (TTAB 2014) (nonprecedential), quoting *In re Majestic Distilling*, 65 USPQ2d at 1205, citing *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). In this ex parte proceeding, we do not have the benefit of Registrant's input as to whether confusion has occurred. Thus, Applicant's uncorroborated argument of no known instances of actual confusion is of little evidentiary value. See *In re Guild Mortg.*, 129 USPQ2d at 1163 (quoting *In re Majestic Distilling*, 65 USPQ2d at 1205); *In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973).

Accordingly, the *DuPont* factor regarding the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

F. Conclusion

Because Applicant's and Registrant's marks are identical and are for related goods which travel through the same trade channels to some of the same customers, confusion is likely regardless of any sophistication of the relevant customers.

Decision: The refusal to register Applicant's mark AQUABARRIER under § 2(d) of the Trademark Act is affirmed.